No. 21207

UNITED STATES COURT OF APPEALS
For the Ninth Circuit

LARRY P. SMITH, et al., Appellants,

vs.

HILLTOP REALTY, INC., et al., Appellees,

HILLTOP REALTY, INC., et al., Cross-Appellants,

vs.

LARRY P. SMITH, et al., Cross-Appellees,

and

THE AUSTIN COMPANY,

Additional Cross-Appellee as to Count No. 4 Only.

ON CROSS APPEAL FROM THE JUDGMENT OF THE
UNITED STATES DISTRICT COURT OF THE
WESTERN DISTRICT OF WASHINGTON

ANSWER BRIEF OF THE AUSTIN COMPANY CROSS-APPELLEE AS TO COUNT NO. 4 ONLY

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I. INTRODUCTORY STATEMENT

This case involves the sale price of a parcel of unimproved and. The original Complaint was filed January 4, 1960, by ? Realty, Inc., a real estate broker, commissioned to sell the The defendants were the partners of Larry Smith and Company, estate consulting firm which had been retained by the broker mit an economic report on the best use of the land. The

Complaint charged that Larry Smith and Company was guilty of fra in failing to disclose its position as potential owner and devel of a shopping center some 7 straight line miles away, and that t economic report was false. The Complaint charged that because o the alleged false report, the broker affected the sale of the la for less than it now claims it might have been worth.

Counts 3 and 4 of the Complaint alleged violation of t Ohio and Federal Anti-Trust Laws by the Smith partners.

In July of 1964, more than four years after the acts complained of took place, the First Amended Complaint was filed and The Austin Company was named as an additional defendant as to Count 4 only, i.e., alleged violation of the Sherman Act. After extensive pretrial discovery, the District Court granted The Austin Company's Motion to Dismiss and the other defendants' Motion for Partial Summary Judgment, thereby eliminating Counts and 4 of the First Amended Complaint.

The trial below involved only Counts 1 and 2 for false market report and breach of contract. The Austin Company was no in that trial.

The facts are relatively few and undisputed, and are m ly contained in the agreed Statement of Facts, pleadings and pre trial depositions.

Throughout this brief, for the most part, cross-appel Hilltop Realty, Inc., will be referred to as "plaintiff"; cross-

llee, The Austin Company, will be referred to as "Austin", the other cross-appellees, referred to as "Smith", or "Smith ndants."

II. STATEMENT OF THE CASE

Mr. Severance Millikin was the owner of a 151 acre resi- ial estate located in Cleveland Heights, Ohio, in the middle of nsely populated area, 7 straight line miles East of downtown eland, Ohio. In 1954, Mr. Millikin retained The Austin Company, ngineering and construction firm, with headquarters in Cleveland, ave the property rezoned for commercial purposes, with the end iew of using the property for a shopping center and other ercial purposes. A taxpayers' suit was brought, attacking rezoning, but the rezoning was finally upheld on December 18, , by the Supreme Court of Ohio (R. 1061). After the original ning in 1954, title to the property was transferred to a new oration, Severance Estate, Inc. (R. 1062), in which The Austin any held a 75% interest and Millikin 25% (R. 1080, 1152).

In May of 1955, The Austin Company retained Larry Smith Company, a well-known developer of shopping centers, to act heir consultant in connection with Severance (R. 1069). From beginning of their association, both Smith and Austin, in ning the development of a shopping center on the property, out to obtain long term leases from two of the three largest

department stores in Cleveland (R. 1199-1201). One of such sto
The May Company, chose a different site in 1958, less than two
from Severance (R. 1219), but the other two, The Halle Bros. Co
and The Higbee Company finally agreed to execute such long term
leases for branch stores in the Severance Center (R. 1153-54).
Severance Millikin sold his interest in the Severance property
Austin, and, thereafter, in May of 1958, Austin decided that it
was not equipped to develop a shopping center due to lack of
personnel familiar with that field of endeavor. Accordingly,
Austin decided to sell the Severance property and asked Smith t
find a buyer (R. 1133).

In December of 1958, Smith considered buying the prop
for its own account, and in January of 1959, began exploring th
possibility of financing such a venture (R. 1147, 1152). On
February 22, 1959, the Cleveland newspapers announced that The
Halle Bros. Company and The Higbee Company would build branches
in the shopping center to be known as Severance, and were negot
ting contracts to this end with The Austin Company (R. 1153-54)
On December 23, 1959, The Halle Bros. Company and The Higbee Co
leases were executed (R. 1207), and Cleveland newspapers publis
these facts on December 29, 30 and 31, 1959 (R. 1208-11). Acti
negotiations between The Austin Company and Smith began July 31
1959 (R. 1180).

On February 10, 1960, Smith and Austin executed an agree-
ıich in effect gave Smith an option to purchase Severance,
ırchase being contingent on Smith being able to obtain pro-
ıancing (R. 1225-26). No publicity was given the agree-
ınding Smith's arranging its financing (R. 1229-30). In
ırse this was arranged, and on July 21, 1960, the Cleveland
ers announced the start of the Severance Shopping Center
ıith as the owner and developer (R. 1244). Part of the agree-
tween Austin and Smith, provided for design, engineering and
ıction of the shopping center, and other buildings, by
(R. 1245).

Severance Shopping Center is located in one of the older
of Cleveland and was designed to cater to the residents of
ınd Heights, Shaker Heights, University Heights, Lyndhurst,
Pike and other so-called upper class, white collared areas
6-67).

To the northeast of Severance, 7 straight miles, or 9 miles
, was located the Nutwood Farm on which was the original
ıce of a Mr. Charles Devereaux (Smith opening brief, Plate I).
wood Farm was partly in the Village of Wickliffe and partly
Village of Willoughby Hills (R. 1056). The original house
m buildings, and some of the land, had been sold (R. 1055-
he granddaughters of Mr. Devereaux, known as the Winslow Sisters

sought to sell the remaining 175 acres (R. 1056). Hilltop Real
Inc. was retained for this purpose in 1958 (R. 1137-39). Hillt
entered into a supplemental agreement with the granddaughters o
Mr. Devereaux on July 22, 1959, setting the sale price at $3,50
per acre (R. 1168-69).

In September of 1959, Mr. Petti, the President of Hil
top, having become familiar with Larry Smith and Company's repu
as shopping center developers, sought to retain Smith to help w
the sale of Nutwood Farm (R. 1188). By December 5, 1959, a con
between Hilltop and Smith was agreed upon, under which Smith ag
to prepare an economic report on the feasibility of Nutwood Far
as a shopping center site (R. 1202). No contention is made tha
Austin participated in, or had any knowledge of Smith's connect
with Hilltop, and no contention is made that Austin had heard o
Nutwood Farm as a proposed shopping center site.

Smith had agreed to prepare its report on Nutwood Far
at a cost of $4,500 (R. 1189). When it became apparent from
Smith's preliminary findings that the conclusions would be nega
it was agreed that Smith would furnish a memorandum instead of
formal report. The charge was reduced to $2,920. The memorand
was mailed to Hilltop on January 8, 1960 (R. 1212).

Following the announcement of Smith as the developer
Severance, in July of 1960 (R. 1244), Hilltop complained to Smi

ut the contents of Smith's report in light of Smith's interest Severance, since in the meantime Hilltop had sold Nutwood Farm $3,500 per acre (R. 1238). Nearly two and one-half years er, Hilltop, having obtained an assignment from the Winslow ters of their rights against Larry Smith and Company only, filed original Complaint in this action, on January 4, 1963. Ex- stive discovery proceedings followed, including the taking of deposition of L. Paul Gilmore, Chief Financial Officer of The tin Company, who was primarily in charge of the Severance Pro- t for The Austin Company. It was brought out at that time t The Austin Company had no knowledge of Smith's connection h Nutwood Farm, or even the existence of it. The prayer in the ginal Complaint was for $1,312,500, all premised on the claim t the Smith report was false and misleading, and caused Hilltop lty, Inc. to sell Nutwood Farm for $3,500 per acre, instead of some higher figure.

On July 24, 1964, an Amended Complaint was filed, naming Austin Company as an additional defendant, as to Count 4 only, the prayer in the Complaint was increased to $8,862,500.

From the beginning, as a party in this case, it has been tually impossible to determine just what Hilltop claims Austin as a conspirator, in violation of the Sherman Act, since it is claimed that Austin had any connection with, or knowledge of, intiff, Nutwood Farm, or Smith's alleged false report. What is

it then that appears in the various documents as acts committe by Austin in any way affecting plaintiff, or its assignors? T claims are few and wholly irrelevant.

The first, and most frequently stated, is that The A Company "conspired" with Larry Smith and Company to "marry the competition".* (Cross. App. Br. 9). No matter how many times expression is repeated, or in what context it is used, all it is that The Austin Company sought and succeeded in obtaining 2 year leases for branch stores in the Severance Shopping Center from two of the three largest department stores in the City of Cleveland, a normal, accepted objective of every developer of successful shopping center.

What next is claimed? That Austin had knowledge of Smith preparing "slanted" reports for submission to the depart stores (Cross. App. Br. 10). Plaintiff attached great signif cance to some sinister, or illegal, aspect of this fact. As testified by Austin's Mr. Beatty, whatever was intended by the use of the word "slanted", was:

---

* This phrase appeared in an early letter from Smith to The Halle Bros. Company. The full sentence reads, "Many of the department stores with whom we work have accepted the princ of 'marrying the competition' just as you have done in West gate" (Westgate is a shopping center west of Cleveland, co taining two major department store branches.)

"It means that each report would then have in it the economic facts that were of interest to the particular person for whom the report was being prepared * * *." (Beatty Deposition, p. 171).

Next, The Austin Company is charged with conspiring to vent the risk of a third shopping center development taking ce (Cross App. Br. 10). It must be remembered that The Halle s. Company, The Higbee Company and The May Company, the three gest department stores in the Cleveland Area, were fierce com- itors, and particularly The Halle Bros. Company and The Higbee pany. They all catered to the same clientele. The market to be ched by each, if it was to establish a sizeable branch in the so- led eastern suburbs of Cleveland, included the Cities of Shaker ghts, Cleveland Heights, University Heights, Beachwood, Pepper e and Lyndhurst, as the principal ones.

The May Company had eliminated itself as a prospective ant at Severance by establishing a large branch store in versity Heights, in an existing shopping center, less than a e and one-half from Severance, and readily accessible from all these suburbs. So that the context can be understood, The May pany's location was the second shopping center site, if erance was to be considered the first. What, therefore, was third? This was a proposed development by Visconsi and Rat- , at the corner of Shaker Boulevard and Richmond Road in Beach- d, Ohio.

The Halle Bros. Company considered building at Beachwo (Walter M. Halle Deposition, pp. 22, 23, 35, 36 and 51). The on references to this third development taking place, or being pre- vented, as plaintiff charges, appear in statements by representa tives of Smith to the effect that if The Halle Bros. Company would agree to go into Severance with The Higbee Company, Beachw would probably never get off the ground. It must be remembered, however, that Hilltop is not the developer of Beachwood, and the developers of Beachwood have not sued anyone. These references all took place prior to August 2, 1958, when Hilltop was first r tained to sell the Nutwood Farm. Yet Hilltop constantly charges The Austin Company and Larry Smith and Company with concurrent conspiratorial acts to "prevent the development of Beachwood and Nutwood Farm".

Next, and the only other charge of conspiratorial acts is that The Austin Company, with Larry Smith and Company, set ou to create a shopping center that would dominate the eastern subu of Cleveland. The only evidence of this proposed domination app in interoffice memorandum by Mr. Trieger of Larry Smith and Comp in 1956, in which he states his personal opinion as follows:

> "Of course, the less department space the landlord has to build, the better off he would be from a financial or investment standpoint, as long as there is enough department store space to dominate the east side and to allow the project to operate successfully." (Ex. 260, p. 13, November 19, 1956).

These are normal business activities in the shopping

er development field. As plaintiff's President, Mr. Petti,

ified:

> "There are just so many major tenants in a given area that could provide the impact to build a true regional center, and when Higbee's and Halle's were taken away from the regional market, so to speak, and put at Severance, then it lessened the possibilities of others going in other areas." (Second Petti Deposition, p. 138-139).

Hilltop's own President never considered Severance as in

same trading area as Nutwood Farm, and retained Smith, primarily,

use it had done such a good job for Austin in the original develop-

of Severance. Hilltop's President, Petti, testified in his

deposition, before Austin was made a defendant, as follows:

> "My interpretation was that Larry Smith's job had been done. Higbee's and Halle's had been secured; Severance had become a fait accompli, so to speak, and I thought they were ready for another job." (Petti First Deposition, pp. 225-226).

* * * *

> "The fact that Larry Smith had done the Severance report, I think, was discussed, and I think I liked the idea that Larry Smith had done the Severance job, because, once again, I felt that they had done a thorough job in that area; they got very wonderful results at Severance, and would have been familiar with the overall northeastern Greater Cleveland area in which we had our interest.
>
> "* * * it might be that Homer Hoyt had done work for the Ratners, and we felt we were more in conflict with their centers at Shoregate and Goldengate than we were at Severance, and it was always our thinking that we were in an entirely different trading area, being that it was in what we call the blue collar class as against Severance,

which is in the little higher area. So, with this arg ment, I think it was my feeling that prevailed, and we went ahead with Larry Smith.

"Q. It was your opinion that Severance was not within the Nutwood trade area; is that correct?

"A. * * * I felt that they were on each other's borde but they were not in the same trading area." (First D Deposition, pp. 230-232). (Emphasis added).

This is the testimony of Mr. Petti, the President of plaintiff Hilltop Realty, Inc.; he was the managing executive of plaintiff and represented plaintiff's only contact with Larry Sm and Company. (Plaintiffs never had, and do not claim, any conta with The Austin Company prior to July, 1964, when they joined Th Austin Company as a defendant in this lawsuit.) This testimony Mr. Petti was given before that date, and he testified that Severance and Nutwood were so located that they were not competi tive with each other -- they were not in the same trading area.

The foregoing, then, represents plaintiff's claim agai The Austin Company under the Federal anti-trust laws. These Fed anti-trust contentions are the only basis for a claim of jurisdi tion over The Austin Company in this case.

III. PROCEEDINGS IN THE DISTRICT COURT AND THE DISTRICT COURT'S DECISION

The First Amended Complaint, joining The Austin Compan as an additional defendant as to Count 4 only, was filed July 24 1964 (R. 100). We will not burden this Court with a review of the voluminous record of pretrial discovery proceedings, motions

rings and briefs. Suffice it to say the Smith defendants
ed a Motion for Partial Summary Judgment (R. 344), and The Austin
pany filed a Motion to Dismiss, raising four issues: first,
t the First Amended Complaint was filed more than four years
er plaintiff, Hilltop, had full knowledge of all relevant facts
ating to the claimed anti-trust cause of action; second, that
ltop had no standing to sue since it stood only as an assignee
the Winslow Sisters' assignment of their false report and
ach of contract claims against Smith*; third, that the Court
no jurisdiction over The Austin Company, since the First
nded Complaint did not allege facts constituting a cause of
ion under the Sherman Anti-Trust Act; fourth, the First Amended
plaint failed to state a claim against The Austin Company upon
ch relief could be granted (R. 441).

On December 14, 1964, the District Judge ordered Counsel
Hilltop to file a detailed Concise Statement of Factual Conten-
ns (R. 530). Such document was filed (R 651), consisting of

In October of 1964, Hilltop filed a motion to have the Winslow Sisters joined as parties plaintiff because of a fatal defect in Hilltop's claim against the 18 new parties defendant in the First Amended Complaint, including Austin. So far as Austin is concerned, its Motion to Dismiss was granted and we will refer to Hilltop, only, as "plaintiff", because the Winslow Sisters were permitted to become parties after Austin was dismissed from the case.

39 pages (larded with conclusions of law and fact). The Distri
Court, in his Memorandum Decision of March 17, 1965 (R. 794) an
Amended Memorandum Decision of March 29, 1965 (R. 827), accepte
true plaintiff Hilltop's factual contentions and all reasonable
inferences to be drawn therefrom, and held:

> " * * * these facts do not state a cause of action under the antitrust laws." (R. 829)

He then stated:

> " * * * plaintiff shows no causal connection between the restraint of shopping center competition and its claim of injury." (R. 829)

The Court then said:

> "In view of this disposition of the case the Court finds it unnecessary to decide the issues raised relative to the statute of limitations, the effect on interstate commerce, the 'target area' cases cited by the parties or the complicity of The Austin Company in the alleged conspiracy." (R. 831)

The District Court dismissed The Austin Company from
case (R. 950).

The case later went to trial against the Larry Smith
partners and others, on Counts 1 and 2, which consisted of a cl
of fraud and breach of contract in connection with the Smith re
on Nutwood Farm. The decision in that portion of the case is n
here on appeal by both plaintiff and defendants, and plaintiff
has also appealed the earlier decision dismissing The Austin
Company from the case. The decision on that part of the case w
went to trial holds, in part:

"The Court has not been persuaded that the conclusions reached in the Nutwood Market Analysis were wrong. * * * the Court finds that the plaintiffs have failed to establish by the requisite burden of proof that as a result of such fraud or breach of contract the plaintiffs sustained any damage in the sale of the Nutwood Farm property. * * *" (Written Memorandum Decision of 10-27-65 (R. 1469-70).

We agree with the District Court's findings that the Smith ort was not false and plaintiff has suffered no damage, but we not understand the award of punitive damages, and attorneys' s, totaling $150,000.

IV. THE ISSUE PRESENTED

Did the District Court err in granting The Austin pany's Motion to Dismiss?

V. ARGUMENT

A. THIS IS NOT A FEDERAL ANTI-TRUST CASE.

1. The Austin Company committed no acts forbidden by the Federal Anti-trust Laws.

As the District Court put it, after accepting as true all the plaintiff's factual contentions and reasonable inferences to drawn therefrom:

"It appears that plaintiff's basic complaint is the submission to it by Smith of a false market analysis report which caused Hilltop and the Winslow Sisters to sell the Nutwood property at a price substantially below that which they could have obtained if they had sold it for shopping center development." (R. 828)

Similarly, the nub of Hilltop's claim appears at the top page 16, of cross-appellant's (plaintiff's) brief, as follows:

> "Smith's false report on Nutwood deprived Hilltop of the one essential ingredient to developing another regional shopping center." (Emphasis added).

Not only does this "one essential ingredient" have not to do with Austin, but the District Court found, as a fact, tha Smith's report on Nutwood Farm was not false, and that Hilltop h failed to prove any damage.

How then does Hilltop try to state a case under the Fe Antitrust Laws against Austin? The principal charges against Au relate to the period from April of 1955 to February of 1959, and solely to a few phrases lifted out of documents obtained on disc prior to Austin's being made a defendant in this case and summar in Hilltop's factual contentions, p. 32, as follows:

> "During this period they conspired to dominate the relevant market through persuading Higbee's and Halle' by slanted report 'to marry the competition' and divid the market so as to eliminate potential competition fr other shopping center sites* and by taking all possibl steps to 'avoid the risk of a third development taking place' so as to dominate the entire Eastside of Cleveland." (R. 684-85)

The only other acts on the part of Austin about which

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* "* * * so as to eliminate potential competition from other sh ping center sites * * *." This is the basic flaw in Hilltop' charge. The "competition" is between "sites", i.e., parcels real estate in different locations. Austin persuaded The Ha Bros. Company and The Higbee Company to choose Severance as the "site" where they would locate their east side branch stores.

laint is made are its execution of leases with The Halle Bros. any and The Higbee Company in December of 1959, selling the erty to Smith in 1960, and, in order to assist the financing he Severance Center, loaning Smith funds for which it ived a second mortgage and an interest in the shopping center.

If Hilltop, or the Winslow Sisters, have any valid claim damages against The Austin Company for violation of the Sherman on the undisputed facts in the instant case, then every owner of erty in the eastern suburbs of Cleveland, or real estate broker, an exclusive sales agreement from such owner who believes such e of property is a potential shopping center site, also has a e of action against The Austin Company, on the ground that Austin Company obtained leases for branch stores from two of three major department stores in the City of Cleveland, result- in a strong and successful shopping center at Severance, thereby enting every other property owner from doing the same thing.

Section 1 of the Sherman Act, 15 U.S.C. Sec. 1, provides:

> "Every contract, combination * * * or conspiracy in restraint of trade or commerce among the several states * * * is hereby declared to be illegal."

It is our understanding of the law that a "conspiracy" is entering into an agreement to do an unlawful act, with an evil ose, with knowledge that the act is unlawful, and that a piracy includes as an element, a corrupt motive. Conspiracy

is a plan to commit either a crime or an evilly designed scheme or confederacy to cause civil injury. (8-A, Words and Phrases, 386-387).

Normal conduct in planning a shopping center developme is no such conspiracy.

2. Even if it was assumed that illegal acts took place, plaintiff has no claim under the Federal Anti-trust Cases.

Section 4 of the Clayton Act (15 U.S.C. §15) under whi plaintiff does and must make its claim, provides:

> " * * * any person who shall be injured in his busines or property by reason of anything forbidden in the antitrust law may sue therefor * * *." (Emphasis adde

The "business or property" of the plaintiff was that o a real estate broker who would be entitled to a commission if it sold Nutwood Farm. The Winslow Sisters' "business or property" was the ownership of a piece of real estate, Nutwood Farm.

The "business or property" of Hilltop was not "establi ing a shopping center". It was a real estate broker. As Mr. Pe President of Hilltop, testified (First Deposition, p. 239):

> "No. We had no owner, no title, no equity in the property. No; we were strictly a broker."

Likewise, the "business or property" of the Winslow Sisters was not establishing a shopping center. They had no int tion of doing so. As testified by Mrs. Ashcraft (Deposition, p. 261):

"Never had any intention of developing the property ourselves."

as testified by Mrs. Powell, (Deposition, p. 67):

"We discussed the fact that there was this thing about developing it ourselves, and we threw that around a bit, but we absolutely decided against it even before this."

The only "business" which plaintiff could possibly claim been affected by any illegal conduct was the hope to sell the ood Farm to someone who would establish a shopping center on property. Likewise, the only "property" involved was Nutwood and the only effect on it was the failure to realize the eased value for the property which plaintiff hoped would result ome purchaser would pay more money for the property as a part planned venture to build a shopping center. There was no ry to the property, but only to plaintiff's hopes with respect hat some would-be prospective purchaser might want to do with property and hence pay more money for it. Plaintiff (cross-llant) states its entire case as follows (P. 16 of Opening f):

"If Hilltop had received a true report, it would have been able to sell the property to others at its true value* for a promising regional shopping center site; or, alternatively, to have developed the property,

---

n finding no damage as a result of the report, the court letermined the "true value" to be just what plaintiff's eceived for it and nothing more.

together with the owners or others, by attracting a major and/or junior department store and the other satellite tenants which support a regional shopping center (R. 689)."

Plaintiff's claims involve only prospective economic advantage and the courts have not permitted recovery on this basis, holding that mere expectations and hopes are not the typ legal interest protected by Section 4.

The District Court in dismissing the contract cause o action, put it this way:

> "The plaintiffs also contend that but for the lack of a favorable market analysis they would have been able to find a buyer for Nutwood Farm who was willing to pay more than did Ridge Hills. On the state of the evidence adduced in this case, such contention amounts to no more than speculation or conjecture." (R. 1470)

In Broadcasters, Inc. v. Morristown Broadcasting Corp 185 F. Supp. 641 (D.C.D. N.J. 1960) the Court said at pages 644

> "The claim for damages under Section 4 of the Clayton Act, supra, must fail for a further reason: the plai have failed to allege facts from which it may be infe that they have sustained an injury to 'business or pr The pertinent provision of the Act affords a remedy t 'person who shall be injured in his business or prope reason of anything forbidden in the antitrust laws.' by the Court). The term 'business or property' is us the ordinary sense and denotes a commercial venture o prise. Peller v. International Boxing Club, 7 Cir. 2 593, 595 and 596; Image & Sound Service Corp. v. Alte Service Corp., D.C., 248 F. Supp. 237, 239; Brownlee Malco Theaters, D.C., 99 F. Supp, 312, 316 and 317. plaintiffs were not engaged in a commercial venture o enterprise at the time this suit was brought; they e tained nothing more than an expectation that they wou be so engaged if the license were granted. Ibid. Th claim for injunctive relief must fail for the same r

Peller v. International Boxing Club, 227 F.2d. 593 (C.A. -7, 5), at page 596:

> "Plaintiff's testimony reveals further that he has sustained no injury to any property right. The construction most favorable to him which can be placed on his testimony is that he entered into a series of separate negotiations which might have ripened into advantageous agreements under which the proposed fight could have taken place. Assuming the allegations as to defendants' conspiracy and as to its effect on the negotiations to be true, and assuming that, except for the conspiracy, plaintiff's negotiations would have been successful, these assumptions cannot aid plaintiff's cause, it appearing affirmatively that he was not injured within the contemplation of the statutory provisions, inasmuch as no property rights could accrue to him in the premises until and unless he succeeded in obtaining the several contractual relationships for which he was negotiating. Cf. Biglow v. R.K.O. Radio Pictures, Inc., 327 U.S. 251, 66 S. Ct. 574, 90 L. Ed. 652, and cases there cited and discussed."

See also Duff v. Kansas City Star Co., 299 F.2d 320, 325 A. -8, 1962) and American Infra-Red Radiant Co. v. Lambert ustries, Inc., 360 F.2d 977, 995-996 (C.A. -8, 1966).

3. Interstate commerce is not involved here -- The Federal Anti-Trust Laws are not applicable.

All we have in this case is a local transaction unrelated interstate commerce. It has been uniformly held that real estate nsactions are local in nature and not covered by the Federal i-Trust Laws. See for example, Gaylord Shops, Inc. v. Pittsburgh acle Mile Town and Country Shopping Center, Inc. and J. C. Penney , D.C.W.D. Pa., 219 F. Supp. 400 (1963). In that case, the intiff, a tenant in a shopping center, brought an anti-trust

action under the Clayton Act against the owner of the center and J. C. Penney Co., a tenant in the center. The shopping center and defendant J. C. Penney Co. were parties to a written agreement under which J. C. Penney Company could prevent additio space being rented to other tenants. Plaintiff was refused spac pursuant to this agreement and sued both the shopping center and J. C. Penney Company for damages under the anti-trust laws. It was conceded that J. C. Penney Company was engaged in interstate commerce, but the Court held that the complained of acts did not occur in the course of interstate commerce. As the Court stated at page 403:

> "All of the subject real estate was situate in Pennsyl and, of course, did not move in interstate commerce. under the broad terms of the Sherman Act, real estate transactions have been held to be strictly local in na and we do not think that the fact that the leases here involved were executed outside Pennsylvania calls for a different conclusion. Similarly, we are convinced that the discrimination to which plaintiff was subject did not occur in the course of interstate commerce." (Emphasis added.)

A recent decision by the United States Court of Appeal the Second Circuit is also pertinent. See Lieberthal v. North Country Lanes, Inc., 332 F.2d 269 (1964). In that case, the pla tiff had an agreement with one defendant to build a building and lease it, with land, to the defendant. The defendant terminated the agreement. Plaintiff sued all of the defendants under the anti-trust laws, claiming a "conspiracy" among the defendants, a

the acts were done for the "express purpose of stopping the of bowling alley equipment and material in interstate commerce". Court held that the complaint did not establish Sherman Act ations either (i) "based on acts occurring in interstate erce" or (ii) "through local acts having a substantial effect nterstate commerce." As stated in paragraph 4 of the editor's abus:

> "Complaint containing allegations that defendants entered into a conspiracy to stop the interstate flow of bowling alley equipment and material into a city in New York to prevent completion of a bowling alley which would have competed with other bowling alleys in the city was insufficient to state a cause of action under the Sherman Act based on local acts having a substantial effect on interstate commerce. Sherman Anti-Trust Act, §§ 1, 2 as amended 15 U.S.C.A. §§ 1, 2." (Emphasis added.)

tated by the Court at pages 270-271:

> "The amended complaint alleges that the Plattsburgh area draws bowling alley trade from Vermont and Canada and contains additional averments, as summarized by the district judge, that:
>
> > 'a. the building leased by plaintiff to North Country had been erected, the equipment had not yet been installed, and the lease included a percentage of the returns to be received from the bowling business and from the sale of items of merchandise (presumably food and beverages principally);
> >
> > 'b. bowling alleys in Vermont and Canada compete with those in the Plattsburgh area;
> >
> > 'c. North Country actively solicited the patronage of bowling leagues in Vermont and Canada;

'd. North Country advertised in Canadian and Vermont Newspapers, soliciting customers in Canada and Vermont to come to Plattsburgh to bowl and "used radio and television media" (it is not stated where) also to solicit such customers;

'e. North Country and the other defendant operators of bowling alleys brought, or intended to bring, into Plattsburgh bowling alley equipment which moved in (or would move) in interstate commerce from outside New York;

'f. the equipment "scheduled to be brought into Plattsburgh" in interstate commerce was substantial and included "kitchen and service equipment";

'g. the "equipment, supplies and appurtenances being brought to Plattsburgh were items of interstate commerce for delivery to the ultimate consumer" (which seems strange, considering the nature of a bowling business);

'h. the equipment for the 32 alleys in the building of plaintiff, which was to be in interstate commerce, did not arrive;

'i. the merchandise to be sold by North Country in the premises, which was to be in interstate commerce, did not arrive;

'j. competition with bowling alleys in Canada and Vermont was lessened;

'k. the flow of bowling alley equipment in interstate commerce was restrained; and

'l. defendants acted "for the express purpose" of stopping the interstate flow of "bowling alley equipment and material" into Plattsburgh." 221. F. Supp. at 686-87.

"The District Judge held that, even assuming the truth of these allegations, as he was required to do in passing on the motion to dismiss, the plaintiff did not sufficiently allege a restraint of interstate commerce. We agree."

272:

"We hold that the complaint does not establish a Sherman Anti-Trust Act violation based on acts occurring in interstate commerce."

page 273:

"We hold that the complaint does not establish a violation of the Sherman Anti-Trust Act through local acts having a substantial effect on interstate commerce."

Hilltop argues that certain materials used in the construc- the Severance Shopping Center might have come from outside te of Ohio, and, therefore, that the construction of the involved interstate commerce, subject to the Sherman Act. been uniformly held that items coming from outside of a state o be in the flow of interstate commerce within the Sherman ust Act once they have come to rest within the State. See v. Woodmere, Inc., 217 F.2d 148 (CA 4, 1954) where the plain- llege violation of the Sherman Act by defendants through tions on vaults to be installed in defendants' cemeteries. trict Court granted the defendants' motion to dismiss on und that there was no interstate commerce involved within ning of the Sherman Act. The Court of Appeals affirmed, at page 149:

"We come first to the contention of plaintiffs that interstate commerce under the Sherman Act is here involved because plaintiffs import from without West Virginia some of the materials which

> they use in the manufacture of their burial boxes and vaults. This contention seems to be quite lacking in merit. Certainly, it finds little or no support in the decided cases."

And at page 150:

> "Equally without merit is plaintiff's argument that the Sherman Anti-Trust Act may be invoked on the ground that interstate commerce is involved because some of the metal vaults sold by them in West Virginia had, at some earlier time, been brought into West Virginia from some other State. These vaults cease to be in the flow of interstate commerce, within the Sherman Anti-Trust Act, once they have come to rest in the warehouse of plaintiffs, and are there held for local sale."

The Supreme Court has held that local activities do n constitute interstate commerce within the meaning of the Sherma Act. In United States v. Yellow Cab Co., 332 U.S. 218 (1947) a pages 230-234, it held that local taxicab operations, even thou serving passengers arriving from interstate journeys, was not interstate commerce, since the interstate journeys ended when t passengers arrived in that state. The Court stated at pages 231-232:

> "Here we believe that the common understanding is that a traveler intending to make an interstate rail journey begins his interstate movement when he boards the train at the station and that his journey ends when he disembarks at the station in the city of destination. What happens prior or subsequent to that rail journey, at least in the absence of some special arrangement, is not a constituent part of the interstate movement."

The obtaining of shopping center leases with major depart- stores had no more connection with interstate commerce, or ation of the anti-trust laws, than the shopping center lease lved in the case of Savon Gas Stations No. 6, Inc. v. Shell Oil 203 F. Supp. 529 (D.C.D. Md., 1962), affirmed 309 F.2d 306 (C.A. 962), certiorari denied 373 U.S. 911 (1963). The lease required wners of the shopping center to construct a gasoline service ion for Shell and also provided that the lessor would not it the use of its property for the purpose of a competing line service station. The Court states: (p. 534)

> "Restrictive covenants like Article 1A are part of the familiar pattern of shopping center financing, as disclosed by the cases cited in part II hereof, where they are an inducement to attract the prime tenants required by professional lenders. In this case, the restrictive covenant is too limited in geographical scope to be vulnerable to attack under any authority which has been called to my attention.
>
> "Far from substantial, the effect of Article 1A and its enforcement on interstate commerce is incidental and inconsequential; hence, the jurisdictional requirements of the Sherman Act are not met."

ndant's motion for summary judgment was granted.

Thus the Maryland District Court recognized one of the ness facts of life that even restrictive covenants in shopping er leases, let alone leases without such restrictive covenants, gned to induce "prime tenants required by professional lenders" ot constitute facts on which a violation of the anti-trust laws be based.

In summary, the result complained of by Hilltop is th the decision by The Halle Bros. Company and The Higbee Company locate at Severance precludes their location at any or all of t possible sites available at the same time. This decision no mo gives rise to a cause of action under the Sherman Act than a decision by a prospective purchaser to buy from manufacturer A, rather than manufacturer B.

The District Court in its Opinion of March 29, 1965, stated:

> "Austin is alleged to have conspired with Smith in the general objective of restraining shopping center competition, but no contention is made that Austin conspired in any way specifically with respect to Nutwood.
>
> "The court is of the opinion that these facts do not state a cause of action under the antitrust laws. Assuming arguendo, that there was in fact an anti-trust violation by the defendants, including Austin, plaintiff shows no causal connection between the restraint of shopping center competition and its claimed injury. By plaintiff's own allegations its injury was caused by the fraudulent breach of a fiduciary duty. The fraud itself did not constitute the antitrust violation. To recover, plaintiff must establish two things: (1) A violation of the Antitrus Act and (2) damages to the plaintiff proximately re-sulting from the acts of the defendants which constit a violation of the Act." (R. 828)

The District Court then cited Glenn Coal Co. v. Dicki son Fuel Co., 72 F.2d 885 (4th Cir. 1934); Schatte v. I.A.T.S.E 182 F.2d 158 (9th Cir. 1950), cert. denied, 340 U.S. 827; and finally relied on Peterson v. Borden Co., 50 F.2d 644 (7th Cir.

sel for cross-appellants takes exception to the applicability eterson v. Borden Co., on the ground that it was an early . Suffice it to say that early or not, it is still applicable in any event, the principle for which it stands was reaffirmed his Court in Conference of Studio Unions v. Loew's, 193 F.2d 54 (9th Cir. 1951, cert. denied, 342 U.S. 919) and by the Court ppeals for the Second Circuit in Bookout v. Schine Chain tres, 253 F.2d 292 (2nd Cir. 1958) opinion by Judge Learned .

4. Even assuming illegal acts, plaintiff was not within the "Target Area" as required under the Anti-Trust Laws.

The President of plaintiff Hilltop testified that rance and Nutwood Farm were "not in the same trading area" 12, supra) and hence were not in competition with each r and not in the so-called "target area".

This Court, in recognizing the "target area" concept, limited the right to prove damage under the anti-trust laws to mants who have suffered direct injury to established businesses.

Conference of Studio Unions v. Loew's, Inc., 193 F.2d 9th Cir. 1951, certiorari denied 342 U.S. 919, 1952), supra, Court said at page 55:

> "He must show that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry. Otherwise he is not

injured 'by reason' of anything forbidden in the anti-trust laws.

"Such a construction is in accordance with the basic and underlying purposes of the anti-trust laws to pre serve competition and to protect the consumer. Recov and damages under the anti-trust law is available to who have been directly injured by the lessening of cc tion and withheld from those who seek the windfall of damages because of incidental harm." (Emphasis added

Even the cases on which Hilltop relies in claiming th recent court pronouncements have enlarged the target area conce emphasize the necessity for an existing business affected by th alleged unlawful acts.

See Twentieth Century Fox Film Corporation v. Goldwyn 328 F.2d 190 (9th Cir. 1964) where the plaintiff was an establi producer of motion pictures. At page 220:

"Assuming, but not deciding, that this 'target area' concept is relevant in determining whether the plain- tiff in a private antitrust suit may claim the benefi of Section 5 of the Clayton Act, plaintiff was within that area under the allegations of his complaint. As one which desired to exhibit motion pictures which it produced, plaintiff was within the area of the econon which was endangered by the alleged combination and monopoly with regard to the exhibition of moving pict ures." (Emphasis added.)

In Harman v. Valley National Bank of Arizona, 339 F. (9th Cir. 1964) the plaintiff was an established bank and was involved in the loaning of funds, which was the basis of the action. At page 567:

"But in any event, the present complaint alleges tha object of the general conspiracy was the unreasonabl

restraint and monopolization of the Arizona money market in which CLIC had acquired a contractual right to funds, the destruction of which affords the basis for appellant's claim." (Emphasis added.)

Hilltop and the Winslow Sisters did not have an establish-
business, but only the hope that some prospective purchaser might
e a plan for establishing one.

B. PLAINTIFF'S ALLEGED CAUSE OF ACTION ACCRUED MORE THAN FOUR YEARS BEFORE THE COMMENCEMENT OF THIS ACTION AND IS BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS

The only claim against Austin is based upon an alleged viola-
n of the Sherman Anti-Trust Act. The applicable statute of
itation is 15 U.S.C.A. § 15(b), a pertinent portion of which reads
follows:

"Any action to enforce any cause of action under §§ 4 or 4(a) shall be forever barred unless commenced within four years after the cause of action accrued. * * *"

The substance of Count No. 4 of the plaintiff's First
nded Complaint against this defendant is that this defendant
spired with Larry Smith and Company, and others, for the pur-
e of preventing the development of regional shopping centers
the eastern suburbs of Cleveland, Ohio, and more particularly,
plaintiff's depositions and discovery have been directed
ard showing that this defendant and the other defendants,
nspired" to get two department stores, The Halle Bros. Company

and The Higbee Company, to locate a store in the Severance Shopping Center.

As shown in the agreed Statement of Facts, plaintiff knew in the summer of 1959 that The Halle Bros. Company and The Higbee Company planned to put branches in Severance. Plaintiff knew in the summer of 1959 that Larry Smith and Company were, a had been, working as consultants for The Austin Company in the development of Severance. (R. 1166-67, 1191-92). Plaintiff knew in December of 1959 that The Halle Bros. Company and The Higbee Company had executed leases with The Austin Company to enter Severance (R. 1208). Prior to the end of 1959, plaintif knew The May Company had decided to put its major branch store in Cleveland Heights, but not at Severance. Therefore, plainti knew that the three major Cleveland department stores had made their plans for large branch stores in the eastern suburbs of Cleveland, a number of miles from Nutwood Farm.

Plaintiff knew by the end of December, 1959, that the development of Severance, with The Halle Bros. Company and The Higbee Company each having branch stores in it, would be a lar shopping center, a strong shopping center, and would, in all probability, dominate the primary trading area around Severanc

There is no contention that Austin participated in, contributed to, or even knew of the Smith report until after t

inal Complaint was filed in January of 1963, or that Smith failed to advise Hilltop, fully, of its relationships with in as a potential purchaser of the Severance property. Thus pertinent facts on which Hilltop bases its cause of action for ation of the Sherman Act by Austin were known to it more than years and six months prior to the filing of the First Amended laint on July 24, 1964. The claim against Austin is, there-, barred by the statute of limitations.

VI. ADDITIONAL CONTENTIONS OF CROSS-APPELLANT

The plaintiff has belabored its brief with irrelevant ers on which we will only comment briefly. First, the complaint ade that Austin terminated depositions*. While this is true, District Court froze pretrial discovery, to which order Hilltop's sel took no objection, and held Austin's motion for Protection , but at the same time, permitted Hilltop's counsel to present y factual contention he could think of to make out a cause of on. He did so, and the Court accepted as true "these contentions all reasonable inferences to be drawn therefrom." (Amended randum Opinion, March 29, 1965); (R. 827, 828).

---

s shown in Austin's Motion for Protection, counsel for plain-iff had run up 1500 pages of repetitive questioning of Austin ompany principal witnesses and had served notice to take epositions of 44 additional witnesses in Cleveland, New York nd Texas.

Hilltop complains that certain files, originally in t possession of Austin, and turned over to Smith, are "mysterious missing." Great to-do is made of this. With customary imagina counsel for Hilltop asssumes they contain "many important items such as "restrictive terms of earlier drafts of the leases", an that the absence of these papers "is further proof of the conspiracy to violate the anti-trust laws." This is pure fantasy.

Suffice it to say that after 6000 pages of pretrial depositions and microscopic examination of hundreds and hundre of documents produced by Smith and Austin, plaintiff has only managed to find a few phrases which, when taken out of context and used, charge Austin with conspiring (1) "to marry the compe tion" by persuading two department stores to execute leases for branches in one shopping center, (2) for the purpose of elimina "potential competition from other shopping center sites", (3) to prevent a third development from taking place, and (4) so as dominate the east side of Cleveland.

Discovery of these few phrases in Smith's files is th basis for inflating a complaint about the sale price of a parce farm land into an anti-trust case. The transparency is obvious w we look at the phrases. No. 1 sounds like some sort of merger which somehow might affect competition. No. 2, "eliminating po competition" has an anti-trust connotation, except that it refe

y to competing parcels of real estate, or "sites" for shop-
g centers. No. 3 also sounds sinister in that something is
ng prevented from developing, and No. 4 obviously converts the
d "dominate" into "creating a monopoly", which is the cardinal
committed by anti-trust violators.

Hilltop's brief argues that a jury could find damages as
esult of the conspiracy of Austin and Smith. We respectfully
mit that the District Court gave Hilltop every opportunity to sub-
written factual contentions on which a cause of action could have
n made against Austin, that Hilltop did so and the Court accepted
se contentions as true, and found that Hilltop's contentions
not present a cause of action under the anti-trust laws"
ended Memorandum Opinion, March 29, 1965; R. 827, 828).

VII. CONCLUSION

Hilltop's only claim against any one was for an alleged
se report by Larry Smith and Company on the economic value of the
low Sisters' Nutwood Farm as a possible site for a shopping
er. Even Hilltop's President, Petti, so stated when his second
sition was taken (p. 139):

> "Q. So far as Nutwood was concerned, the only thing was the false report, isn't that correct?
>
> "A. Well, as we were directly concerned, yes."

To summarize again the conduct of Austin, we find a
al, legal, business pattern. Austin acquired land after having

it rezoned for commercial purposes; retained Smith as a consult to help persuade The Halle Bros. Company and The Higbee Company execute leases for branch stores in a proposed shopping center the land, thereby enhancing its value, sold the land, with the leases attached, to Smith; later assisted Smith in financing, h loaning it money, in return for which Austin took a second mort gage and part of the equity in the shopping center which was to built thereafter; and, finally, Austin built the shopping cent and that is all there is to it.

On the other hand, Hilltop, a broker, hoped to sell Nutwood Farm to some one who might use it for shopping center p poses. It was not rezoned for commercial purposes; no departm stores showed any interest in executing leases for branch stor on the farm; Smith was hired to prepare an economic report on Nutwood Farm because Smith had done such an excellent job for Austin. The report was negative; then claimed to be false, bec of Smith's conflict of interest; damages were sought against S because Hilltop claimed the Nutwood Farm might have been sold more money if the report had been favorable.

Austin had no knowledge of Hilltop, Nutwood Farm, or Smith report.

The District Court, in that part of the case which w to trial, found the report was not false and that Hilltop sold th

perty for what it was worth.

The Austin Company should never have been made a party this litigation.

We submit the Decision of the District Court in dismissing antitrust claim against The Austin Company should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I CERTIFY that, in connection with the preparation of brief, I have examined Rules 18, 19 and 39 of the United es Court of Appeals for the Ninth Circuit, and that, in my ion, the foregoing brief is in full compliance with those s.

By_____
Ronald E. McKinstry
Of Attorneys for
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THE AUSTIN COMPANY